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United States General Accounting Office
Washington, DC 20548

Comptroller General
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Decision

Matter of: Safety-Kleen (Pecatonica), Inc.

File: B-290838

Date: September 24, 2002

William E. Hughes III, Esq., Whyte Hirschboeck & Dudek S.C., for the protester.
J. Michael Sawyers, Esq., Drug Enforcement Administration, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the
General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly excluded protester's proposal from the competitive range for four contract areas under request for proposals (RFP) for cleanup of clandestine drug laboratories where evaluators reasonably concluded that proposal was not among the most highly rated based on protester's failure to propose response facilities for some contract areas in locations designated in RFP, to offer an adequate level of staffing for one contract area, and to furnish any detail regarding its plans for subcontracting with small disadvantaged businesses.

DECISION

Safety-Kleen (Pecatonica), Inc. (SKI) protests the exclusion of its proposal from the competitive range for several contracts to be awarded under request for proposals (RFP) No. DEA-01-R-0030, issued by the Drug Enforcement Administration (DEA) for the cleanup of clandestine drug laboratories.

We deny the protest.

The DEA explains by way of background that its mission of enforcing federal narcotics laws requires the seizure and destruction of both illicit drugs and the facilities in which they are manufactured, and that destruction of the clandestine laboratories sometimes entails the disposal of environmentally hazardous chemicals. Agency Memorandum of Law at 1. To ensure its ability to meet its environmental clean-up responsibilities, the agency issued the solicitation at issue here, seeking a contractor to "do all things necessary for or incident to, the performance of characterizing, packing, loading, transporting, storing, analyzing and disposing of hazardous waste seized at clandestine drug laboratories" RFP § B.1.1.

The RFP divided the country into 44 “contract areas,” and contemplated the award of an indefinite-quantity/indefinite-delivery contract for a base period of 1 year and up to four 1-year options for each area.¹ Contract areas of relevance to this protest are 24-03 (Iowa), 25-03 (North Dakota, South Dakota, and Minnesota), 26-03 (Wisconsin and the Upper Peninsula of Michigan), and 27-03 (Northern Illinois and Indiana) (hereinafter referred to as contract areas 24, 25, 26, and 27 respectively). RFP attach. J.2. The solicitation designated one or two “contract centers” in each contract area,² and advised offerors that points would be deducted from the scores of offerors who failed to propose response facilities located in the specified centers.³

The RFP provided for award to the offeror whose proposal represented the best value to the government. The solicitation instructed offerors to submit both a technical proposal addressing the solicitation’s technical evaluation factors and a business proposal consisting of offeror certifications, a price schedule, a small business subcontracting plan, and a small disadvantaged business participation plan. The solicitation advised that the technical proposal would receive paramount consideration in the selection of an awardee (or awardees), except in the event that two or more proposals received approximately equal technical ratings. Evaluation factors and subfactors and their respective weights were as follows:

<u>Factor</u>	<u>Weight</u>
1. Technical Approach/Resources	450 points

¹ The solicitation noted that while a total of 44 contracts might be awarded, the government expected to award more than one area to a single contractor. RFP § L/M.12.

² For contract area 24, Des Moines, Iowa, was designated as the contract center; for contract area 25, Minneapolis, Minnesota and Sioux Falls, South Dakota were designated; for contract area 26, Milwaukee, Wisconsin was designated; and for contract area 27, Chicago, Illinois and Indianapolis, Indiana were designated.

³ Specifically, the RFP stated:

Points will be deducted from offerors whose response facilities are not located in the Contract Center(s). Points will be deducted from offerors whose response facility is not located in the Contract Center and/or if there are two contract centers in a Contract Area and the offeror has a response facility only in one Contract Center and not both.

RFP § L/M.16, ¶ E.

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|---|------------|
| a. Technical Approach | 200 points |
| b. Personnel/Equipment/Material | 150 points |
| c. Health and Safety | 50 points |
| d. DEA Security Clearances | 50 points |
| 2. Resource Conservation and Recovery Act
(RCRA) Treatment, Secure Storage and Disposal | 300 points |
| a. Treatment/storage/disposal facility letters
of commitment | 200 points |
| b. Physical Security | 100 points |
| 3. Administrative/Management Services | 250 points |
| a. Problem Solving | 100 points |
| b. Paperwork | 100 points |
| c. Training | 50 points |
| 4. Past performance (to be evaluated under foregoing
three factors, rather than as a separate criterion) | |
| 5. Small Disadvantaged Business (SDB) Participation Plan
(to be included in the Business Proposal) | 200 points |

Twenty-three companies responded to the RFP, some bidding on a single contract area and others bidding on multiple areas. SKI submitted offers for only contract areas 24, 25, 26, and 27. For contract area 24, a total of nine offers were received; for contract area 25, seven offers; for contract area 26, four offers; and for contract area 27, eight offers. A technical evaluation panel reviewed the proposals and assigned them the following point scores:

Contract Area 24

<u>Offeror</u>	<u>Technical Score</u>	<u>Proposed Cost (in millions)</u>
Offeror A	1089	12.1
Offeror B	1087	9.1
Offeror C	895	[Deleted]
Offeror D	862	[Deleted]
Offeror E	834	[Deleted]
SKI	795	13.3
Offeror F	605	[Deleted]
Offeror G	585	[Deleted]
Offeror H	504	[Deleted]

Contract Area 25

<u>Offeror</u>	<u>Technical Score</u>	<u>Proposed Cost (in millions)</u>
Offeror A	1092	5.9
Offeror B	1069	[Deleted]
Offeror C	872	[Deleted]
SKI	783	8.0
Offeror D	722	[Deleted]
Offeror E	650	[Deleted]
Offeror F	594	[Deleted]

Contract Area 26

<u>Offeror</u>	<u>Technical Score</u>	<u>Proposed Cost (in millions)</u>
Offeror A	1094	7.6
Offeror B	1072	4.4
Offeror C	892	[Deleted]
SKI	776	5.5

Contract Area 27

<u>Offeror</u>	<u>Technical Score</u>	<u>Proposed Cost (in millions)</u>
Offeror A	1092	9.1
Offeror B	1079	[Deleted]
Offeror C	961	[Deleted]
Offeror D	910	[Deleted]
Offeror E	889	[Deleted]
Offeror F	872	[Deleted]

SKI
Offeror G

776
685

13.3
[Deleted]

For contract areas 24 and 26, the TEP determined that the competitive range consisted of the proposals from Offerors A and B, whereas for contract areas 25 and 27, the TEP included only Offeror A's proposal in the competitive range. With regard to SKI's proposal specifically, the TEP noted in connection with contract areas 25 and 26 that the proposal had not been included in the competitive range because while SKI had submitted the second lowest cost proposal, its technical score was too low for consideration. Technical Evaluation Panel Report at 43. Similarly, with regard to contract area 27, the TEP explained that SKI's cost proposal was "significantly higher" than Offeror A's, and in addition, its technical score was "too low for consideration." Id. at 45.⁴

By letter dated June 27, 2002, the contracting officer notified the protester that its proposal had not been included in the competitive range for any of the four contract areas at issue here.⁵ The letter noted the following areas of deficiency in the protester's proposal:

- The RFP required the proposal to contain specific contract centers for responses. SKI's proposal stated that several of its response facilities were not located in the contract centers.

- SKI's proposed level of staffing for Iowa, consisting of two chemists and one truck, was inadequate for the level of activity in that area.

- SKI's SDB Participation Plan was not sufficiently detailed.

SKI takes issue with the agency's evaluation of its proposal, arguing that it should have been included in the competitive range for all four areas for which it submitted an offer.

The determination of whether a proposal is in the competitive range is principally a matter within the reasonable exercise of discretion of the procuring agency, and in reviewing an agency's evaluation of proposals and subsequent competitive range determination, we will not evaluate the proposals anew in order to make our own

⁴ In explaining its rationale for selection of the competitive range for contract area 24, the TEP did not mention SKI, presumably because its technical and price rankings did not place it among the most attractive proposals.

⁵ SKI surmised early in June that it had not been included in the competitive range for the areas in question and on June 3, filed an agency-level protest objecting to its apparent exclusion. In her letter of June 27, the contracting officer both responded to the protest and furnished formal notification of the protester's exclusion from the competitive range.

determination as to their acceptability or relative merits; rather, we will examine the record to determine whether the documented evaluation was fair and reasonable and consistent with the evaluation criteria, as well as procurement statutes and regulations. Ervin & Assocs., Inc., B-280993, Dec. 17, 1998, 98-2 CPD ¶ 151 at 3. An agency is not required to retain in the competitive range a proposal that is not among the most highly rated ones or that the agency otherwise reasonably concludes has no realistic prospect of award. Federal Acquisition Regulation § 15.306(c)(1); SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 5.

First, the protester argues that it was improper for the agency to downgrade its proposals for contract areas 24 and 25 for having failed to propose response facilities in the designated contract centers when it did in fact propose to locate a response facility in the designated contract center for area 24 (i.e., Des Moines) and in one of the two designated contract centers for area 25 (i.e., Minneapolis).

As to contract area 24, the agency asserts, and the report shows, that the protester's proposal was not downgraded based on the location of its response facility, which was properly sited in Des Moines; rather, as the contracting officer notes, SKI "lost points from other aspects of its technical proposal for Contract Area 24." Contracting Officer's Statement at 3. With regard to contract area 25, on the other hand, SKI was penalized because while it proposed a response facility in one of the designated contract centers (Minneapolis), it did not propose a response facility in the other designated center (Sioux Falls). The downgrading of SKI's score based on the protester's failure to offer a response facility located in Sioux Falls was consistent with the RFP's evaluation scheme, which specifically advised offerors that points would be deducted from their technical scores in the event that a contract area contained two contract centers and they proposed a response facility in only one of the two centers.⁶ RFP § L/M.16, ¶ E.

The protester further argues that the agency's decision to downgrade its proposal based on the location of its response facilities ignores its proven ability, as the incumbent contractor for several contract areas, to provide good service from response facilities located outside the contract centers. The protester also states that 99 percent of pick-ups occur outside the contract centers, and that, in many cases, its response facilities are closer to the response sites than they would be if located in the contract centers.

Again, we note that the RFP placed offerors on notice that one of the factors that would be considered in evaluating their technical approaches was the location of

⁶ We note that rather than filing comments responding to or seeking to rebut the position taken by the agency in response to this or any of its other arguments, SKI merely requested that its protest be decided on the existing record.

their proposed response facilities, and that offerors would lose points for failing to locate response facilities in the designated contract centers. Thus, while offerors were to receive credit in the technical evaluation for strong past performance, they were also to lose points for failing to locate response facilities in the designated contract centers. In other words, regardless of the quality of an offeror's past performance, it would have been inconsistent with the RFP's stated evaluation scheme for the evaluators to fail to downgrade a proposal that did not offer response facilities located in the contract centers. Any objection to the evaluation scheme now is untimely since, to be timely, a protest objecting to the terms of a solicitation must be filed prior to the closing date for receipt of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2002).

The protester also takes issue with the agency determination that its proposed level of staffing for Iowa (contract area 24), consisting of two chemists and one truck, was inadequate for the level of activity in that contract area. The protester notes that it stated in its proposal that:

[a]dditional personnel may be added, as needed. Depending on the physical location of the removal site, or should additional resources be needed--in the case of subsequent requests--teams from either SK (Pecatonica) or the Eagen, MN office will be dispatched to respond.

SKI's Proposal at 8. The protester contends that the agency should expect that upon award, each contractor will evaluate the resources needed to perform the contract and staff appropriately. SKI further notes, with regard to equipment, that while its proposal identified only one vehicle located in Iowa, it also identified a number of vehicles located in adjacent contract areas and stated:

The above [vehicle summary] lists the primary resources at each Response Facility that will be used as first response to a removal activity. Any of the other resources listed in this table will be used, as needed, to assure satisfactory completion of the job or jobs. In addition to the above list, our company owns and operates over 1,300 transport vehicles throughout the country capable of transporting any form of hazardous waste. Safety-Kleen also has rental agreements in place with national equipment/vehicle suppliers (e.g. Hertz, Ryder) that allow Safety-Kleen to supply any additional equipment required on a timely basis.

Id. at 40. According to the protester, these aspects of its proposal, coupled with its performance as an incumbent, demonstrate that it has the necessary staff and resources to perform the contract.

The protester's argument is in essence that it proposed adequate staffing and vehicles by offering to add further personnel and vehicles as needed. In our view,

however, it was reasonable for the evaluators to consider what the protester was committing to furnish in the event that its proposal were accepted, i.e., in the case of Iowa, two chemists and one truck, in evaluating the protester's proposal.

Finally, SKI argues that its proposal should not have been downgraded for the lack of detail in its SDB Participation Plan because while the plan did not discuss all of the factors identified in the RFP, it did "indicate[] Safety-Kleen's commitment, methods, procedures, and goals in utilization of SDB firms." Protest at 6.

Regarding the protester's argument that its proposal should have received a higher score under the SDB Participation Plan evaluation factor, we are not persuaded that it was unreasonable or inconsistent with the stated evaluation criteria for the agency to have assigned SKI a minimal score (i.e., 10 of a maximum possible of 200 for each area) under the SDB Participation Plan factor. The RFP placed offerors on notice that their proposals would be evaluated under the SDB Participation Plan factor on the basis of the following subfactors:

1. The extent of an Offeror's commitment to use SDB concerns. Commitment should be as specific as possible, i.e. are subcontract arrangements already in place, letters of commitment, etc. Specific SDB concerns must be identified with points of contact and phone numbers. Enforceable commitments will be weighted more heavily than unenforceable ones. Targets expressed as dollars and percentage of total contract value for each SDB participating will be incorporated into and become part of any resulting contract. The extent of participation of all SDB concerns in terms of the value of the total acquisition must be identified. . . .
2. The complexity and variety of the work SDB concerns are to perform. Greater weight will be given for arrangements where the SDB shall be performing a greater variety of work, and work of greater complexity. . . .
3. Fairness, reasonableness, and realism of costs proposed by SDBs for the work they will perform. . . .
4. Past performance of the Offeror in complying with subcontracting plans for SDB concerns. An offeror with an exceptional record of participation with SDB concern will receive more a favorable evaluation than another whose record is acceptable. . . .

RFP § L/M.18.

It is clear from the foregoing that the agency desired a high degree of specificity from offerors in describing their SDB commitments. SKI furnished no information regarding specific SDB commitments, however. Instead, it merely furnished a copy of its "Small, Small Disadvantaged, HUBZone and Woman-Owned Small Business Subcontracting Plan," which explained in general terms how SKI goes about

identifying potential subcontractors and administering subcontracts, and a page setting out its subcontracting goals for this contract, including the estimated dollar value of planned subcontracting with small disadvantaged businesses.

An agency's evaluation is dependent upon information furnished in a proposal, and it is the offeror's burden to submit an adequately written proposal for the agency to evaluate. Chant Eng'g Co., Inc., B-279049, B-279049.2, Apr. 30, 1998, 98-2 CPD ¶ 65 at 7. SKI's proposal simply did not furnish the required information with regard to its plan for subcontracting with SDB concerns. Based on the informational deficiencies in this aspect of SKI's proposal, we do not think that it was unreasonable for the agency to assign the protester a minimal score under the SDB Participation Plan evaluation factor.

In sum, the protester has not demonstrated that the evaluators' scoring of its proposal was unreasonable. Moreover, it has not demonstrated that the TEP's determination that its proposal should be excluded from the competitive range was unreasonable. As previously noted, an agency is not required to retain in the competitive range a proposal that is not among the most highly rated ones or that the agency otherwise reasonably concludes has no realistic prospect of award. Here, the evaluators reasonably concluded, with regard to all four contract areas, that SKI's proposal was not among the most highly rated based on its technical scores and its price, see Matrix Gen., Inc., B-282192, June 10, 1999, 99-1 CPD ¶ 108 at 4, and that it had no realistic prospect of award since for each area there was at least one offeror that had received a significantly higher technical score and offered a lower price than SKI. Accordingly, we see no basis to object to the decision to exclude SKI's proposal from the competitive range.

The protest is denied.

Anthony H. Gamboa
General Counsel